

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA L. ARROYO)	
Claimant)	
VS.)	
)	
U.S.D. 500)	Docket No. 261,385
Respondent)	
Self-Insured)	

ORDER

Claimant appeals from a Preliminary Decision entered by Assistant Director Kenneth J. Hursh on October 15, 2002.

ISSUES

The assistant director concluded that claimant's injury did not arise out of and in the course of her employment. Accordingly, claimant's request for preliminary benefits of medical treatment and temporary total disability compensation was denied.

Claimant contends the assistant director erred. Claimant asserts she sustained her burden of proving she suffered a series of accidents through September 11, 2000, which arose out of and in the course of her employment with respondent and resulted in injuries to her low back, neck, left shoulder and arm.

Respondent contends the assistant director's Preliminary Decision should be affirmed. According to respondent, not only has claimant failed to meet her burden of proving accidental injury arising out of and in the course of her employment, which was the basis for the assistant director's denial, but in addition, claimant has failed to prove she provided respondent with timely notice of accident. Respondent contends it first became aware of this claim when claimant informed the school principal in October 2001. The issue of timely notice, however, was not decided by the assistant director and, therefore is not reviewable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the arguments, the Appeals Board (Board) finds that the assistant director's Preliminary Decision should be reversed.

Claimant's form K-WC E-1 Application for Hearing does not allege a specific work-related accident. Rather, it alleges a series of accidents beginning August 1995 through September 2000, ". . . by lifting and loading musical instruments, and by playing the violin and viola."¹ Claimant alleges that each and every working day she suffered aggravations of her injuries, some of which may have preexisted her employment with respondent.

Claimant denied having any back problems before going to work for respondent. Since then, she has had three back surgeries, the first in February 1997, then August 2001 and the last in April 2002. The first two were performed by Dr. Robert T. Tenny and the third was performed by Dr. William R. Reed, Jr. Claimant was involved in a motor vehicle accident in 1977 in which she was thrown from the vehicle. Claimant acknowledged suffering an upper back injury in that accident but denies injuring her lower back. It is the lower back claimant is alleging injury to in this claim.

Dr. Linda Louise Arroyo (now Kruger) worked for Unified School District 500 in Kansas City, Kansas, beginning in 1995 until September 11, 2000. She was the Wyandotte High School orchestra director and also a strings specialist teaching elementary strings. This required her to travel to all of the middle schools and high schools in the district. Her job duties included carrying musical instruments including basses and cellos weighing up to twenty-five pounds, on a daily basis during the school year.

Claimant did not work during the summer of 2000. Following the end of the school term in May, claimant traveled to Brazil for two weeks. On July 21, 2000, claimant was at home cooking dinner when she turned and experienced pain in her back and going down her leg. She described this pain as similar to that which she had experienced in 1997. Claimant acknowledged it was this incident that prompted her to seek treatment with Dr. Dickerson on August 2 and Dr. Tenny on August 10, 2000. But Dr. Tenny's August 10, 2000 report to Dr. Kamille Ziegenhorn states claimant ". . . returns to the office noticing the onset of low back pain during the last school year and had undergone physical therapy with some improvement in her symptomatology." There is no mention of the July 21, 2000 incident while at home cooking. Claimant has been treating with muscle relaxants and pain medications as needed since 1997. All of the surgeries as well as the treatment with the various doctors and rehabilitation facilities were paid for by claimant's private health insurance coverage, and not by workers compensation coverage. During this time period claimant also provided private lessons at the Music Stand and at her house.

¹ K-WC E-1 filed Nov. 21, 2000.

The January 29, 2002, medical report by orthopedic surgeon, Edward J. Prostic, M.D. includes the following history, "Mrs. Arroyo reports injury during the course of her employment for Kansas City, KS Public Schools in May, 2000. She was repetitiously lifting musical instruments and developed worsening of back and right leg pain." "... She denies injury subsequent to her May, 2000 injury." As Dr. Prostic's report relates claimant's low back injury to her "employment in May, 2000 . . .", Dr. Prostic was apparently unaware of the aggravation claimant described suffering at home while cooking in July 2000 as well as the worsening alleged to have occurred at work at the start of the 2000-2001 school year.

When her last school year started in August of 2000, claimant was still experiencing pain from the end of the previous school year in May 2000. She described having two days of concerts towards the end of the school year in May 2000 which involved all the elementary age students. Claimant had to help move all the cellos and basses from the back of the stage area to the front. This caused her back pain to worsen. Then in late August 2000 getting the instruments ready for the next school year caused her to experience horrible back pain. Claimant reported her symptoms to the supervisor of music arts, Jean Ney. Claimant testified that she specifically related her back pain to moving the instruments. Claimant also testified Ms. Ney told her when she was leaving on September 11 not to apply for workers compensation adding that it would be a "bad idea."² Claimant described having several conversations with Ms. Ney between late August 2000 and September 11, 2000, her last day of work before claimant was taken off work by her treating physician, Dr. Tenny.

The record includes a memorandum dated June 25, 2001 from Jean Ney, coordinator of fine arts and physical education, to William Helms, safety director, Kansas City, Kansas public schools regarding claimant.³ In that memo Ms. Ney relates that claimant made no mention of back pain before the end of the school year in May 2000. When claimant returned to school in the fall 2000 she did complain of back problems but "made no indication that the problems were work-related." Ms. Ney indicates that the first knowledge she had that claimant was reporting an accident and pursuing workers compensation was during a telephone conversation with claimant on December 15, 2000. At that time claimant related that she had completed an accident report in October which she gave to Mr. Walter Thompson, the principal of Wyandotte High School.

Numerous medical records and reports were introduced and made a part of the record at the September 19, 2002, preliminary hearing before Administrative Law Judge Robert H. Forschler. It is significant that those medical records contain histories wherein claimant relates her playing and teaching music as aggravating her back, neck and shoulder complaints well before the date claimant left work in September 2000; as far back

² P.H. Trans. at 36.

³ P.H. Trans., Resp. Ex. A.

as at least January 27, 1996 regarding the neck and September 16, 1997 regarding her low back.

A May 30, 2002, letter by Dr. Reed contains the following opinion:

It is my opinion that the herniated nucleus pulposus surgery and subsequent fusion surgery is all aggravated by her work activities. The herniated nucleus pulposes could certainly be caused by lifting heavy musical instruments since this always involves lifting frequently, repetitively, and in an unusual postural stance.

Claimant has proven she suffered repetitive injuries and aggravations from a series of accidents arising out of and in the course of her employment with respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision entered by Assistant Director Kenneth J. Hursh on October 15, 2002, should be and is hereby reversed and this matter is remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ January, 2003.

BOARD MEMBER

c: Thomas S. Stein, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Robert J. Foerschler, Administrative Law Judge
Kenneth J. Hursh, Assistant Director
Director, Division of Workers Compensation

